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THE PRESIDENT'S ANNUAL ADDRESS, BY

HENRY R. GOETCHIUS,

BEFORE THE FOURTEENTH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION.

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In the contemplation of nature we are often impressed with what is known as the law of compensations. This rule applies alike in the physical and the spiritual. Here are the mountain ranges with their colossal piles of rocks irregularly heaved high by some convulsive force. There are the smiling valleys stretching far away to touch the feet of other mountain chains. Now is the ebb, there is the flow of the sea. Every good has its ill, every joy its sorrow, every smile its tear. This rule is not confined to the individual person or thing. The aggregation of persons, the community, the State, likewise comes under its influence. The sentiment of the aggregation of individuals, that is of the State, projected outside of itself, is to the State a law; it is history, which, as it is impressed upon time and space, makes the State.

In the history of the State we see this rule of compensation. To the State, as to the individual, there are periods of shadow and of sunshine, periods when her people are upon the mountain top of exalted feeling, or in the valley of despondency; periods of peace and of war. Our own State of Georgia, since its earli-

est time, has lived its joys and its sorrows, its hopes and fears; has had its days of glory, its golden age of prosperity and greatness, its epochs of gloom and depression.

As one of the original of the Colonial States, a history of Georgia is interesting to the general reader. As a commonwealth which has attained greatness in the sisterhood of States, her history to a native Georgian is always attractive.

It seems to be the sense of this Association, informally expressed in some one of its past conventions, that the annual address of its presiding officer should at least have a trend towards the historic. My purpose is to endeavor to follow this desire, but in doing so I ask the indulgence of the convention. Historians, like poets, are born, not made, and it is not every one who possesses that imagination, which Lord Macaulay says every historian should possess who would place his narrative in an attractive and picturesque form.

I have chosen for my subject "Litigation in Georgia during the Reconstruction Period."

To many of the older members of the Georgia bar nothing can be presented under this head that will be new or unknown. Some now before us, and others who will perhaps read these lines, were living actors in the day of which we would write. They passed through the ordeal of fire and sword which immediately preceded reconstruction, and when "grim-visaged war had smoothed his wrinkled front" not to them was it permitted "to caper nimbly in a lady's chamber to the lascivious pleasing of a lute," but "lowering clouds still lingered," and the work of rehabilitation and reconstruction fell to their hands. A large majority of the noble judges and great lawyers, who so faithfully worked to redeem the State, have gone to their long home, but some still remain this side of the river. To these last the recall of the reconstruction period can prove as some nightmare only, but to the younger members of the bar there are facts of interest that will but illustrate the great work which was wrought by these survivors and their departed contemporaries.

In a review of the life of Georgia, a most eminent historian, a late member of your body, has divided her early existence into epochs characterized as the aboriginal epoch, the period of discovery and exploration, the period of schemes for colonization, the settlement under Oglethorpe, the life of the Province under the guidance of Trustees and under the control of a president, the epoch of the Royal Governors and the Revolutionary War and, lastly, the erection of Georgia into an independent State. Faithfully has the gifted man of letters presented the story of Georgia from her earliest period to the epoch of her elevation to the dignity of an independent commonwealth. This was the period of her birth and her infancy. The period in which she attained that vigor of growth and promises of character which afterwards developed the greatness of the State. Interesting indeed is the story. Those were days when it was a contest with savages for "existence from without and the unruly members within, and there was famine and pestilence and disaster of every kind." Emerging from that era and entering upon a life of statehood, the State, for three-fourths of a century, rounded out a life of greatness. In less than twelve years after the inauguration of her first Governor and after two preliminary efforts at the establishment of a Constitution which were merely initiatory, she adopted, in 1798, a chart for her guidance in the form of a Constitution, which remained the sheet-anchor of her greatness till in the times of revolution and in the shadow of portentous civil war, her people, frenzied with the excitement of a disrupting general government, adopted a new Constitution.

The causes which had made the colony of Georgia ready to assume the garments of statehood when Lyman H. Hall was inaugurated Governor were similar to those which gave to her people a distinctive growth in the first early years of her life as a State. This growth was remarkable in that it followed so closely the assumption of the toga of Statehood. In the interval between the administration of Governor Troup and the year 1860, Georgia made wonderful progress in population, in mate-

rial wealth and in other recognized indicia of modern civilization, while in the elements of true greatness, the earlier period, the third decade of this century was her palmy day. Out of these combined conditions have grown a race of people whose true greatness forged the pathway to a splendid commonwealth, the pride of her people, the admiration of her sister States and the empire of her section, but withal a race who in the dark hours or later years gave evidence of greater elements which go to make men. This brief review of the history of our State illustrates the rule of compensations. From an elevation of happiness and greatness in 1861 the State broke away and entered upon a period of darkness and disaster. This was the war period, short but disastrous; flame and sword took the place of law and order, and anarchy reigned. Then came the end, and with the beginning of the end came the necessity of reconstruction.

The opening of the year 1865 presented to the people of the State an unequaled spectacle. The conditions were absolutely indescribable. No historian, though gifted with the pen of a Carlyle, or the imagination of a Milton, can put into words a true picture of existing conditions. Posterity will never fully realize these conditions because pen cannot write of them, tongue cannot tell of them, nor pencil nor brush trace them. There was a complete and utter destruction of her physical resources; the people were wasted and worn, and the larger percentage of the strongest and most vigorous of the male population had given their lives to their country. They had sealed their devotion to principle and had died fighting for what they knew and believed to be the right, and still there were thousands of disbanded soldiers who had returned to their former homes without food, without clothing save the most scanty, and without occupation. To add to this were hundreds of thousands of ignorant and helpless slaves who had been given freedom without a knowledge of its uses. Under such conditions begins the work of reconstruction—the rebuilding of the State.

It will be necessary in treating of the litigation of the period to refer briefly to the subject of reconstruction from a political standpoint. There was what might be termed national reconstruction and social or domestic reconstruction. The status of the Southern States in the Union after the cessation of hostilities was a problem which furnished to the records of our national legislation some of the most intensely interesting pages in the history of the government. We can only refer to it. It was in December, 1865, that the leader of the dominant political party of the country began his arguments in Congress to unfold his design of reconstruction of the eleven States which it was claimed had lately been in rebellion. This design did not take tangible shape till the act of March 2, 1867, which was entitled "an act to provide for the more efficient government of the rebel States." It was in fact an act, as the sequel showed, for the more thorough military subjugation of these States. What might be termed the national reconstruction plan, or political reconstruction legalized, began technically with the enactment of the above mentioned measure in 1867, for the conditions were fixed in this act and the process was in due form inaugurated and conducted under military domination, the State of Georgia having been classified as a member of what was known as the Third Military District.

State or domestic reconstruction, we will assume, for the purposes of this paper, began at the close of hostilities and continued till the year 1872.

The most distinctive feature of the litigation of the early years of the State was probably the settlement of land titles. Then followed an era of general prosperity out of which grew all kinds of litigation, but probably the most marked feature of that era was the subject of slave property. This is not surprising when it is remembered that the value of this species of property was estimated in 1861 at two hundred and seventy-two million dollars. This of course was swept away by the chances of war and with it there was almost a total destruction of all kinds of prop-

erty, so that when the period began of which we write there was little left to the people save their lands and a few head of stock. The first step of the domestic reconstruction was taken by the general government in the appointment of a provisional governor. He had been arbitrarily named on June 17, 1865, by the President of the United States, and he began the work by issuing a proclamation on July 13, 1865, for a convention of the people, and this was to assemble on the fourth Wednesday in October, 1865. It was announced that the oath of amnesty, which had been prescribed by the President, had to be taken to qualify citizens to vote. All redress for wrong was remitted to the military authorities, and slavery was declared extinct. The following sentence occurred in this proclamation:

"The idea, if any such is entertained, that private property will be distributed or parceled out, is not only delusive but dangerous and mischievous, and if any attempt should be made by any person or persons to effect such an object by unlawful means, it will only secure to him or them speedy punishment." This will illustrate the idea pervading the public mind as to the tenure by which property was held and rights secured.

It is an interesting and curious study of the times to note how out of this chaotic state of affairs the wheels of justice, which had almost been completely checked by the rude shock of war, began slowly to turn and the machinery of the courts began to be put in motion.

There were but two cases reported in the Supreme Court during the November term, 1865. One involved a dispute about the liability of certain cotton factors for loss in not following instructions as to cottons intrusted to their care (appealed from the superior court of Richmond county), and the other was an appeal upon a chambers case and related to the recovery of certain cotton on a promissory note.

The meeting of the Convention called by the Provisional Governor and the adoption of the Constitution, the assembling of the legislature in December, 1865, elected as provided by the

Convention, and the inauguration of the Governor elect, Hon. Chas. J. Jenkins, on January 16, 1866, all gave promise of peace and a restored government.

The Governor, upon entering upon the discharge of his duties, assumed that reconstruction was an accomplished fact. He then thought that with the cessation of hostilities and the acceptance of the terms of the surrender as dictated by General Sherman, and because of the further recognition of the requirements of the President as to slavery and war debts, the State of Georgia would be allowed to quietly take her place as one of the States of the Union. This great man, as he prepared himself to lead in the anticipated advancement of the interests of the State, used eloquent words of hope and encouragement in his splendid inaugural address: "With peace restored, the machinery of government once more put in operation, public and private enterprises aroused from their long slumber, educational institutions reopened, our sacred temples and our altars with their holy ministrations frequented as of yore, and the blessings of Almighty God overspreading and revivifying all earnest effort, Georgia will illustrate the teachings of adversity by speedily achieving an enlarged prosperity." With such cheering words did his heart give hope, but in a few months after the utterance of these words this noble representative of the people of his beloved State was standing before the supreme judicial tribunal of the land pleading for the protection of the liberties and property of this people. He appeared as counsel for Georgia in what was by far the most important of all reconstruction litigation. I refer to the case of Georgia *v.* Stanton, Grant & Pope. It was a bill filed in the Supreme Court of the United States in the name of the State of Georgia against the Secretary of War, the General of the Army of the United States and the General in Command of the Third Military District of the South, wherein the defendants were sought to be enjoined from enforcement of the reconstruction acts of Congress. This proceeding involved the existence of the state government of a million of people and

the security of hundreds of millions of dollars of property. The injunction was not allowed, and the bill was dismissed for want of jurisdiction. The case was ably reviewed by your last president in his admirable address. I therefore forbear further reference thereto.

Subsequent to the decision in this case, as is well known, Governor Jenkins was removed by military order, and the period of enforced congressional reconstruction began. Before this removal, however, which did not take place till the early part of the year 1868, there was an honest effort upon the part of the people to accept the situation and to enact such legislation as would restore the affairs of the State to a normal condition.

The General Assembly of 1865 resolved "that his Excellency, the Governor, be requested to communicate to his Excellency, the President of the United States, our fixed and unalterable purpose to observe, obey and defend the Constitution and laws of the United States and the government thereof, and to maintain by all the power of the State the supremacy of said laws, and to ask of him, if not a withdrawal of the troops of the United States from the States, a surrender of all private property belonging to individuals and a restriction of the military to the occupation of the barracks, forts and arsenals, or such other quarters as the Governor may furnish upon contract and compensation, and further to restrict the military to the management and control of the troops and the enforcements (if necessary) of the laws of the United States, as expounded by civil tribunals, appointed and established in conformity to law; and to this end we earnestly invoke the restoration of the privilege of the writ of "habeas corpus."

Out of the peculiar conditions necessitated by the fortunes of war grew enactments of the Constitutional Convention and the legislature of 1865 and 1866, and of the subsequent Convention of 1868 and intervening legislatures which have given to us what might be technically termed reconstruction litigation. Among the very first of these enactments was what was known

as the relief ordinance of 1865, which undertook to adjust equities of contracts. It was ordained that "All contracts made between June 1, 1861, and June 1, 1865, whether expressed in writing, or implied or existing in parol and not yet executed, shall receive an equitable construction, and either party in any suit for the enforcement of any such contract may, upon the trial, give in evidence the consideration of and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made and the value of such currency at any time, and the verdict and judgment rendered shall be on principles of equity; provided, that contracts executed within the time specified, and which were simply in renewal of original contracts made before the said 1st day of June, shall stand upon the footing of contracts executed before hostilities commenced."

The constitutionality of this ordinance was at once attacked and it became necessary for the Supreme Court in Slaughter *et al. v.* Culpepper *et al.*, on a simple foreclosure of a mortgage dated December 5, 1861, made to secure two notes maturing in 1863 and 1864, to decide whether or not such an ordinance did not impair the obligation of contracts. In adopting this ordinance the convention regarded it as absolutely necessary in order to enable the people to carry out their contracts made during the war, and especially to authorize settlements of such contracts with persons acting in a fiduciary capacity. The court held that the ordinance was no more than a change of rule regulating the admission of testimony in courts of law, removing the obstacles created by technical rules to a full inquiry into and investigation of executory contracts made within the period mentioned. The evidence was to be let in, in order to enable the jury from all the evidence to ascertain fairly and honestly what was or must have been the contract between the parties. The court found it necessary to define the effect of this ordinance on judgments and on wills, holding that it applied only to contracts and not to judgments or wills. The true meaning of the ordi-

nance had to be construed. In a suit on a contract in White *v.* Lee, where the obligation was payable in cotton in 1864, the court held it error to have charged that the jury was to find according to the specie value of the cotton at any time. The court used this language: "Very few contracts made during the war can be reduced to any certain rule. Men so necessarily acted under a delusion that each case must stand pretty much on its own circumstances." It was very soon discovered after this construction of the ordinance of 1865 and the enlarging act of 1866 that the relief intended was not afforded, and the legislature of 1868 enacted a law more comprehensive in its effects.

This law was sent upon its mission of provoking endless litigation without having the approval of the Governor who permitted it to become a law by expiration of five days' limit from its receipt. It opened wide the doors for evidence upon all contracts prior to June, 1865, except where the consideration was for slaves; it permitted defendants on motion to open unsatisfied judgments and to have the same reduced, and in cases against trustees it permitted defendants to show the loss or destruction of the trust property or its depreciation. Where levy had been made a mere affidavit of the defendant would enable him to suspend sale and take advantage of the act. It applied to arbitration as well as suits at law, and both parties in any case could testify.

The first and most important case which brought under full review this act of 1868, was the noted case of Cutts & Johnson *et al. v.* Hardee, which went up on an appeal from the judgment of the superior court of Sumter county, sustaining a demurrer to the plea of the defendant, the ground of demurrer being based upon the unconstitutionality of the act as impairing the obligation of a contract. Under the judgment of a divided court (Brown and McCay concurring and Warner dissenting), the cause was remanded. Each of the judges delivered an exhaustive opinion. The Chief Justice (Brown) presented the most elaborate and extensive. He argued at length to prove his

proposition that the act went only to the remedy and not to the obligation. Said he:

"There is a plain distinction between the obligation of a contract and the remedy for its enforcement, and while the legislature may not impair the obligation of the contract, it has undoubted right to change, modify or vary the nature and extent of the remedy (provided a substantive remedy is always left to the creditor, so long as the state does not deny to her courts jurisdiction of contracts), and to prescribe such rules of procedure and of evidence as may, in its wisdom, seem best suited to advance the administration of justice in the courts."

He cited case after case where the court had passed upon and sustained the validity of the ordinance of 1865 and analogized this act to that ordinance. He satisfied himself that the analogy was complete. Judge McCay placed his judgment mainly upon the ground that the effect of the act was simply an alteration of rules of evidence and a change of procedure, but Judge Warner in a very strong and pointed opinion held the act unconstitutional. After citing numbers of cases from the decisions of the Supreme Court of the United States, he says:

"This act of the legislature, in my judgment, necessarily impairs the obligation of the contract, as it existed under the law at the time the contract was made, and it makes no difference whether that result is produced under the name of a remedy, or under the pretext of regulating the admissibility of evidence. Is the contract and the obligation to perform it as valuable now, under the provisions of the act of 1868, as it was under the law applicable to the contract at the time it was made?"

The closing lines of this remarkable dissent stand out prominently as illustrating the intense feeling of those days, existing even between members of the same court. These were his words:

"The Constitution of the United States is the fundamental and paramount law for the government of the courts and people of this State. It has been justly remarked, by an eminent civil-

ian, that 'to attack the Constitution of the State, and to violate its laws, is a capital crime against society, and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are intrusted.' In view of the obligation imposed upon me to support and maintain the integrity of the Constitution of the United States, which declares that 'no State shall pass any law impairing the obligation of contracts,' and not entertaining the least doubt that the act of 1868, both upon principle and the authority of the decisions of the Supreme Court of the United States, is a palpable violation of that Constitution, I am unwilling to embalm myself in my own infamy upon the records of this court, as a debauched judicial officer, in holding that act to be constitutional; therefore I dissent from the judgment of the court in this case."

Almost every imaginable line of defense was set up under this act, but one most availed of and about which decisions were invoked (even of three cases in one), was the defense that the defendant had lost by the war. In Graham *v.* Clark, Graham recovered judgment in 1867 against Clark for about five thousand dollars principal and interest upon notes made in 1860. Clark sought in 1869 to reduce the judgment under the act of 1868. The evidence was that when Clark gave the notes he owned forty-three slaves worth five hundred dollars each and lands which he afterwards sold for Confederate money, and that he was then worth only certain lands valued at about eight thousand dollars. Clark also swore that Graham had nothing to do with the loss. The court below charged the jury that Clark had a right to open the judgment and submit the issues whether it ought to be scaled under the Relief Act and if they found Clark was not at fault they could scale the debt and render what verdict they thought just and equitable. The Supreme Court promptly reversed this as error and added that while such a charge might be mercy it would not be equity. It was in this case also that the court held that it was an improper construction of the act of 1868 to understand it as declaring that the simple

loss of property by the war begets such an equity in the defendant as to allow his debt to be reduced on that account. But the court continued on other lines to trim and circumscribe the general effect of this act, Chief Justice Warner, in his individual expression of the opinion, maintaining that the law was unconstitutional as to contracts made before its passage, but the direct question was never made. Rulings upon other and kindred legislation rendered it unnecessary.

The benefit of the act was denied to one holding a judgment rendered after the act was passed. So also when it was sought to apply its provisions upon a revived judgment.

The second section of the act, in so far as it allowed a new equity and new grounds of defense, was held unconstitutional. In White *v.* Herndon, it was held that the act was violative of the State Constitution in so far as it allowed opening a judgment to let in defenses which were or must have been in issue before or at the rendition of the judgment. Here Judge Warner again attacks the whole act. In nearly every case before the courts in these historic days, there was a divided court, and especially upon the constitutionality of this class of legislative enactments. As late as the August term, 1877, in Dibble *v.* Pearce, Bleckley, Judge, it is stated: "As a court we rule nothing at present on the constitutionality of the Relief Act of 1868." Then referring to Judge Warner's known views, he adds: "Should it become necessary for the other members of the court to deal with the question they will do so, but the case now in hand calls for no discussion respecting it."

Pending the doubts and discussion on the act of 1868, which within two years after its passage had been nearly emasculated, the legislature, yielding to partizan promptings, enacted a still more extensive relief act.

That body in 1870 passed an act which purported upon its face to be an act to extend the lien of set-off and recoupment as against debts contracted before the 1st of June, 1865, and it denied to such debts the aid of the courts until the taxes thereon

had been paid. This act, however, was very sweeping in its provisions as a general relief law, and had it been allowed to remain upon the statute books would have virtually wiped from existence every obligation, whether it had been reduced to judgment or not, which had been founded upon a contract dating before the first day of June, 1865. It was known as the "Tax Act" because it provided that in any suit pending, or afterwards brought, the plaintiff should file with his declaration, or six months thereafter, an affidavit that all legal taxes, chargeable upon such debts or contract sued on had been paid, and he was further required to prove the same upon the trial, otherwise the suit should be dismissed. From the very outset of litigation under this act the then Chief Justice of the Supreme Court of Georgia (Warner) is on record as to the unconstitutionality of the act, and he invariably expressed his dissenting opinion upon all cases which arose under its provisions. One of the strongest expressions of this eminent judge appears in the case of Lott *v.* Dysart, where the plaintiff at the trial in open court, proposed to pay all taxes then due on the debt for which suit was pending. The court below refused to allow payment and the case was dismissed, but was on appeal reversed. It was in the concurrent judgment of dismissal that the Chief Justice, in this case, said that while concurring with the majority of the court in reversing the judgment, he based his opinion upon an entirely different ground. He denied that the object of this act was to increase the revenue of the State, but was for protecting this particular class of debts referred to, and stated that if it was a revenue act then it was unconstitutional, because there was nothing in the title referring to raising revenue. It seems that the majority of the court had characterized it as a revenue measure. Said he: "The plain intent of the act was to deny to the holders of a particular specified class of debts all remedy for the collection thereof in the courts of the State until the taxes thereon had been paid, whether the debts were solvent or insolvent; in other words, to practically outlaw that particular specified class of

debts from the courts, and the enacting clause of the act prescribed the manner of doing it. The discovery of our modern judicial Neckers that this act was intended as a revenue measure is a brilliant afterthought not contemplated by the legislature which enacted it. Their intention, as everybody knows, and which is apparent on the face of the act itself, was to kill and destroy this particular class of debts by depriving the holders thereof of all remedy to enforce the collection of them in the courts, under the pretext that the taxes due thereon had not been paid. This pretext of raising revenue is about as sound as the pretext of the Pope of Rome for selling indulgences to raise revenue."

He then proceeds in a very concise but able manner to show that it impaired the obligation of contracts, formulating a reasoning afterwards sustained, as the sequel will show by our highest authority.

In the case of Walker *v.* Whitehead, which had been before the court in 1871, the constitutionality of the act had been maintained by a majority of the court, but Judge Warner at that time dissented in the following strong language: "My opinions in regard to this class of legislative enactments, have been repeatedly expressed, and this act is quite as obnoxious to the fundamental law of the land, as any of the others; it imposes conditions on the legal rights of the plaintiff, which did not exist at the time the contract was made; is *ex post facto* in its character, inasmuch as it assumes that a particular class of the citizens of the State are guilty of a criminal offense, and outlaws them from the enforcements of their legal rights in the courts; invades the legal rights of the plaintiff under the contract at the time it was made, and impairs the legal obligation thereof, within the true intent and meaning of the prohibition contained in the 10th section of the 1st article of the Constitution of the United States, and is, therefore, void."

This case was appealed but did not reach a decision till the spring term, 1873, in the Supreme Court of the United States.

In the interim the time of the superior courts throughout the State was largely occupied by denying justice to plaintiffs in this class of cases, in pursuance of the ruling of the Supreme Court of the State, but when the decision in Walker *v.* Whitehead, holding that the act was unconstitutional and reversing the Supreme Court of Georgia, was handed down, one after another of these cases as they were brought before the courts were dismissed. At the January term, 1873, of the Supreme Court in the case of Mitchell *v.* Elliott, the case was disposed of under the ruling of the Supreme Court of the United States, Judges Trippe and Warner concurring, but Judge McCay in his dissenting opinion maintaining that the Supreme Court of the United States was wrong, and insisting that the case had not been properly presented before that court. This particular case of Mitchell stands unique in the records of our courts as having connected with it in its dismissal, some twenty-five or thirty other cases involving the same point. This illustrates that our courts were compelled in those stormy days to "shovel out" justice by the wholesale.

In close relation to the litigation arising out of the relief laws of the reconstruction times come the many cases growing out of the construction of contracts made during the war period and the consideration of which was Confederate money. The value of the currency of the people, the purchasing powers of the medium of exchange, is so vital a question as that upon its solution depends the very existence of business and consequent thereon the stability of society.

The State in addition to its manifold distresses was confronted with a condition in this matter, which threatened to obliterate every trace of an obligation founded upon Confederate currency which had been entered into between the years 1861 and 1865. The only currency for that period was Confederate currency and the convention of 1865 had without delay attempted to provide for the embarrassments necessarily growing out of this question. It will be remembered that the relief ordinance provided that

evidence could be submitted upon the consideration and the value thereof at the time the contract was made and was to be executed, and that the intention of the parties was to be sought for.

The student, looking into interesting incidents of the days of which we write, will find reported the case of McLaughlin & Co. *v.* O'Dowd, which was a suit on a note made May 22, 1862, due forty days after date. The defendant pleaded, among other things, that the note was payable in Confederate currency and that the word "dollars" used in the note did not mean greenbacks, which was federal currency. The case was sued at the May term, 1866, of the city court of Augusta, and a set-off was also pleaded in which may be seen the prices of commodities in those days on dates ranging from 1862 to the close of 1864. One item is for 510 pounds of tallow candles valued at $586.50; another item is for 431 pounds of sugar valued at $3,448. In this case what is known as Barber's Tables are incorporated and accepted as the standard of values of Confederate notes estimated in gold. These were tables showing prices of Confederate currency from January 1, 1861, to May 1, 1865, and were compiled by a merchant of Augusta, Ga., admitted in evidence by consent in this case and subsequently accepted as authority in litigation of this class. On the first named date the premium in gold was five for one, and on the last named date twelve hundred for one. In this case the ordinance of 1865 was applied, and the rule was again laid down that the jury should not be restricted to finding a specie value of Confederate notes.

In no class of cases was there more frequently required, than in these Confederate note cases, the application of the rule already referred to as established by the court, that each case growing out of war time transactions would have to stand pretty much on its own circumstances.

One of the first cases to arise for the application of this principle was that of Evans *v.* Walker, where it was held that the court below had no right to tell the jury not to consider the evidence as to value of Confederate money at the time the contract

was made and restrict them to the value at the time the debt became due. This was a suit on a note dated May 4, 1863, and due one year thereafter, and at the maturity of the note Confederate treasury notes were worth $20.00 for one in gold. It was held in this case that the jury could consider the value of Confederate currency at any time pending the contract and should render a verdict on principles of equity. Another case was Cherry *v.* Walker. The question came up upon a suit on a note the consideration of which was Confederate money loaned, and at that date the value was one dollar in gold for five in treasury notes and at its maturity the value was one for twenty, and the value in greenbacks was a premium of 25 per cent. in gold on one dollar in greenbacks.

It was admitted that the consideration of the note was Confederate currency. Again the court below was reversed because it had charged the jury that section of the Code authorizing the holder of a note payable in specifics to recover the value of such articles at the time the note is due and payable. It was held that in the case at bar the court should not have referred to that section at all, and referring to Evans *v.* Walker, above cited, it again says that each case of this character should be decided upon its own merits and the peculiar state of facts under such of the provisions of the ordinance that might apply, and that it especially declined to attempt to lay down general rules to control the decision of future cases.

The question was presented in every imaginable phase. One of the earliest cases was that of Abbott *v.* Dermott, where under a bill it was sought to set aside a sale of real estate in the city of Atlanta made on May 1, 1865, which was after the surrender of the Confederate armies, but the event was not known in Atlanta nor by the parties trading. The purchase price was paid in Confederate notes which at that time were practically valueless, being, as we have seen estimated, at twelve hundred for one. It was held that the contract could not be rescinded.

The sheriffs of the several counties were sadly at a loss in

these disturbed times as to how to legally discharge their official duties. It often happened that a sheriff had collected funds pending hostilities and knew of no one authorized to receive the same. Of course after the surrender he must needs be ruled. Generally the rule was discharged as the sheriff had collected the only kind of money in circulation. An amusing case went up from Baker county. The sheriff collected Confederate money and deposited it in a safe, where, in consequence of the absence of the owner of the safe, who was on the coast making salt, he could not get at the money to pay to order of plaintiff in *fi. fa.* The sheriff tried repeatedly to get in the safe, and to get at Briggs, the owner, who continued to diligently pursue the salt industry, but without avail, and when the crash came the Confederate notes were still in the safe in constructive possession of the officer of the law. A rule followed and the court below made it absolute, but the sheriff was saved by a reversal on the ground that the judgment against him was based on the value of United States currency, the court saying that it should have been left to a jury to find on the value of Confederate money under the ordinance of the convention.

Abstaining from reference to the hundreds of cases which arose, bringing this question in every conceivable shape, such as those already referred to as against sheriffs; others requiring a clear definition of the liability of trustees, guardians and executors; the mixing of funds and of efforts against all classes of persons holding in a fiduciary capacity, and still others, we will refer specially to a novel case reported as Jones *v.* Rogers & Son. In August, 1862, Jones took the note of Rogers & Son for money loaned and also loaned another large amount on the indorsement of said firm on certain other notes given in renewal of debts made in 1859. In September, 1863, the debtor tendered payment in Confederate money at par, though it was then greatly depreciated. Jones refused to accept payment. The firm thereupon threatened to report complainant to "the vigilance committee." This was a body at that time organized and

appointed by a public meeting of the citizens of Macon, Ga. (one of the defendants in this suit being a member), who were charged with the duty of looking after and regulating and punishing offending citizens who refused to take Confederate treasury notes in payment of debts due to them before the war then existing. Complainant still refusing, the defendant reported to the committee. In the progress of the trial the minutes of the meeting organizing the committee were offered in evidence. A preamble and resolutions, breathing of eloquence and patriotism for country and defiance to her enemies, were adopted. For the purposes of this reference we reproduce the first paragraph of the resolutions. It read thus:

"Resolved, That we will hold all persons as enemies of this Confederacy who shall, by any means, depreciate the Confederate currency, or shall refuse to receive it in payment of debts, and will use our best endeavors to bring all such to condign punishment by legal means, if the laws provide such punishment, but if not, to punish with or without law."

Under the provisions of this drastic war measure the offending creditor was cited to appear before this tribunal. This committee was composed of some of the best and most substantial citizens of the community, but in their review of their conduct four years later when the complainant endeavored by bill to recover the amount of his notes because of "duress" in the enforced settlement of 1863, the Supreme Court characterized the body as an "inquisition of fearful proportions and powers." The court held that the case presented facts clearly demonstrating duress by threats and menaces of punishment, and that complainant had been forced to comply with what was an outrage on his rights. The case was sent back that the court might grant relief, which both it and the committee had denied the unfortunate suitor.

By far the most vital question that ever arose in connection with the enforcement of contracts payable in Confederate treasury notes, was as to whether or not such contracts were void

because the notes on which they were based were issued in aid of rebellion. The point was first made in Georgia, in two cases jointly argued at the December term, 1868, on appeal to the Supreme Court from Richmond superior court. One was the case of Miller *v.* Artemus and the other the Ga. R. R. Banking Co. *v.* Eddleman. The defense in each case was that the contract was illegal, both because it was in aid of the rebellion by encouraging the circulation of Confederate treasury notes, and also because it violated the State Constitution, which declared such contracts void. There was a divided court upon the issues, the majority holding the contracts good as between the parties thereto, because the transaction had nothing to do with the prosecution of the war against the United States, and because the Confederate government existed as a fact and was the actual governing authority to which its citizens owed allegiance. Nor were they held to violate the Constitution of the State, because the issuance of Confederate notes was not forbidden by that instrument and they were not evidences of debt intended to be embraced in the prohibition clause where the parties in using them did not intend to aid and encourage rebellion. Justice Brown dissented and found great comfort in the fact that he was sustained in his opinion by the rulings of Erskine, Judge of the Federal Court for the Northern District of Georgia, who at that time was sustaining similar views as shown by his decision in the case of Bailey, Trustee, *v.* Milner, reported in 35 Ga. 330, and Scudder *v.* Thomas, 35 Ga. 364. These two cases were decided in the early part of 1868. Whatever comfort may have been derived by such dissenting opinion was short-lived and the embarrassing situation which existed from the State courts holding one way and the Federal courts the opposite upon the identical question, so often at issue between the citizens of the State, was speedily relieved by the ruling of a higher authority as the sequel will shortly show. Of course a question of this magnitude, one which held in its solution the fate of every transaction conducted by all the people of the seceding States

for four years, necessarily found its way in a very short time to the Supreme Court of the United States. In fact, at the very date referred to (the spring of 1868), when the Georgia judges, State and Federal, were tossed about upon a sea of doubt, there was a case being argued before that tribunal seeking the solution. It was reargued in October, 1868, and decided in November, 1869. This was the case of Thorington, Appt. *v.* Smith and Hartley. The case arose on a bill in equity for the enforcement of a vendor's lien. Land had been purchased and a promissory note for part of the purchase money was executed and delivered to the vendor in November, 1864, payable one day after date at Montgomery, Ala., where all the parties resided. The defense set up as a denial for relief as prayed for was that at the time of the execution of the contract the authority of the United States was excluded from that portion of the State, and the only currency in use or circulation consisted of Confederate notes issued by persons exercising the ruling power of the States known as the Confederate Government; that the land purchased was worth no more than $3,000 in lawful money, and that the contract price was $45,000; that this was by agreement to have been paid in Confederate notes, and $35,000 was so paid, and that the note in controversy for $10,000 was to be discharged in like manner. The court below sustained the defendant. The case on appeal presented the distinct and clear-cut question for the consideration of the court, and for the first time the Supreme Court of the United States was called upon to pass upon the same. The question was, using the language of the court: "Can a contract for the payment of Confederate notes, made during the late rebellion, between the parties residing in the so-called Confederate States, be enforced at all in the courts of the United States?" (There were two incidental questions also arising: first, as to a construction of the word "dollars," as expressed in the contract, and second, as to whether the proof showed that the note was to be paid only in Confederate notes.) In this decision the court discusses at length the precise char-

acter of the Confederate government in contemplation of law. They were unanimous in the opinion that the Confederate notes had been issued in furtherance of an unlawful attempt to overthrow the government of the United States by insurrectionary force, and they likewise agreed upon the principle that no contracts made in aid of such an attempt could be enforced through the courts of the country whose government was thus assailed. When these two propositions met them in the outset of the investigation, how were they to reach a conclusion which led them to a reversal of the court below and to a judgment allowing recovery?

It may be of interest to the reader of judicial history in this day to note that this highest authority of the land in this particular case came very close to a direct declaration of the fact that all adherents of the Confederate cause of every class whatever were guilty of treason against the United States Government.

In contemplating the character of the Confederate Government, the court entered into an elaborate discussion of the distinction between governments *de facto* and *de jure*, and the former were classified first, into those whose character so closely resembles that of lawful government as that its adherents do not incur the penalty of treason, and second, those which are maintained by paramount force. The Confederate Government was held to belong to the latter class of *de facto* governments, and it was held that one of the characteristics of such a government was that it must be obeyed in civil matters by private citizens, such obedience not rendering them liable to the alleged lawful government on a charge of treason. The court then cites two examples illustrative of its line of reasoning, both of which referred to acts within territory forcibly seized and in the control of a regularly constituted government foreign to that whose territory had been occupied. "These," say the courts, "were cases of temporary possession by a lawful and regular government at war with the country of which the territory so possessed

was a part, nor was the Confederate Government, though not originally lawful, less actual or less supreme."

Having thus satisfied its mind, at least for the purposes of this case, that the insurgent government was lawful, it went a step farther and declared that "obedience to its authority in civil and local matters was not only a necessity but a duty." This step enabled the court to go further and hold that Confederate notes were for the Confederate Government lawful currency, and the duty of every citizen required that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying territory of the United States.

Contracts payable in this currency, arising out of transactions in the ordinary course of civil society, though they may indirectly and remotely promote the ends of the unlawful government, could be enforced, and the court thereupon held the obligation a just one.

We have referred to Thorington *v.* Smith at length, although appealed from the State of Alabama, because the first case of record from Georgia upon this question was decided upon the principles of the decision in this case. This Georgia case was decided by the Supreme Court of the United States in November, 1869, after argument had the preceding month. It was on appeal from the Circuit Court of the Northern District of Georgia, and was the case of Dean *v.* Harvey, admr. A bill was filed upon allegations of fraud, the same being founded wholly upon the circumstance that land had been sold for Confederate notes, there being no averment that the notes had been received under fraudulent representations. The court below had sustained a demurrer to the bill and its judgment was affirmed.

The decision in the case of Thorington *v.* Smith gave rise to much litigation throughout the South in the effort of members of the bar to apply the principles therein announciated to the construction of other classes of contracts made in the several Confederate States Notably among the cases presented was one

which went up from the State of Arkansas, wherein it was sought to have the bonds of that State, which were issued during the war, and which had been used as a local circulating medium, declared a valid consideration to support a contract. In the decision rendered, Mr. Justice Miller, concurring, stated that he had assented with much reluctance to the opinion in Thorington *v.* Smith, but said he: "I did assent to it on the ground that while it was unsupported by, and in some degree at variance with, the general doctrine of the turpitude of consideration as affecting the validity of contracts, it was necessary to be established as a principle to prevent the grossest injustice in reference to transactions of millions of people for several years in duration." What an argument is this for our friends who are maintaining that the liberal doctrines of the civil law are gradually usurping the jurisprudence of our country!

As late as the year 1877, the court was called upon to apply its ruling in the case of Thorington *v.* Smith, where, in the case of Stewart *v.* Salamon, it held that a promissory note made in Georgia in 1863 was solvable in Confederate treasury notes. The case was on appeal from the Circuit Court for the Southern District of Georgia, the ruling of which court was in this case reversed by the Supreme Court.

We pass now to another distinctive feature of reconstruction litigation, and that was such as arose out of the several stay-laws to which the necessity of the times gave rise. One of the first of these laws was an ordinance of the Convention of 1865 suspending the statute of limitations in all cases civil and criminal to be and to have been from January 19, 1861, till civil government was restored or until the legislature shall otherwise direct. This was legalized by the convention of 1868 so far as it did not divest vested rights. This made it valid as to prospective rights, but there was doubt as to whether it could restore a party to a right of action lost by the running of the statute for the full period prescribed by law before its passage. An amusing result followed against the plaintiffs in error in the case

of Brian, exr., *et al. v.* Banks, in their effort to take advantage of the alleged illegality of the act of December, 1861, suspending the statute of limitations from 1861 to June 1, 1865, in order to avoid judgment on certain notes sued on. They pleaded that there was no suspension of the statute because the legislature which passed the act of suspension was illegal. On appeal it was held that this contention, if maintained, would prove too much for plaintiffs in error, for if there was no legal legislature there was no legal court in which the holder of the notes could have sued.

We have already referred to the perplexity of the sheriffs as to what was their duty in these uncertain times. These functionaries were often nonplused as to how to enforce the mandates of the courts in the face of the numerous stay-laws. The legislature of 1860 passed an act to grant relief to banks and the people by providing that no *fi. fa.* should be levied except under certain conditions. The act was to remain of force "during the continuance of the present war." In Armstrong *v.* Jones, the sheriff, in October, 1865, had been requested to levy a certain *fi. fa.* which he declined to do unless plaintiff would comply with the conditions of the act as to making certain affidavits. A rule absolute was refused, and on the appeal it became necessary for the court to judicially affirm that the war had ended. The justification of the sheriff depended entirely upon whether or not the war existed on the 12th of October, 1865. This officer must have been one of those fighting Confederates who never did surrender, and who refused to recognize the action of Generals Lee and Johnson, in the surrender of their armies, as binding upon him. The court below seemed equally as imperturbable, and this in the face of the proclamation of the Provisional Governor; but alas for the sheriff, the facts were against him, and he had to make good the loss of the cotton upon which he should have levied. We cannot refrain from quoting half a dozen lines from this decision because they give us a commingling of thought and sentiment of the lamented Chief Justice

Lumpkin and of the late Chas. O'Conor; the one a high priest of the law, who was to Georgia what Marshall was to the Union, the embodiment of Justice; the other the eloquent advocate who has gone down to history as the greatest lawyer of his day, the friend of constitutional government and the unswerving champion of the rights of the South. Said the court, referring to the date of October 12, 1865:

"We hold that the war had terminated before that time. For nearly six months prior to that period, all resistance to Federal authority had ceased, and in the language of Mr. O'Conor, 'the flag of Southern Independence no longer courted the breeze—not a single bayonet of the Confederacy confronted Federal power—and the Confederacy itself was extinguished as completely as if its last champion had perished when Stonewall Jackson fell.' Submission to the authority of the victorious North was absolute and perfect throughout the whole region which had been designated as in insurrection."

There are few cases in the history of litigation in Georgia the decision of which was awaited with more interest than this case of Armstrong *v.* Jones. It was generally believed that in it the court would pass upon the constitutionality of the stay-law, but the court declined to do so, and held "that a court will always abstain from calling in question the constitutionality of an act of the legislature, provided there be any other ground in the case upon which to rest the judgment;" but the question did come a year later in the celebrated case of Aycock *et al. v.* Martin *et al.*, which brought under full force the entire question as to the validity of the stay-laws. The act of 1860, above referred to, had been passed over the executive veto. This was the first stay-law. This was re-enacted in 1861, in 1862, in 1863, and in March, 1865. In November, 1865, the people in convention passed a "stay-law," until the adjournment of the first session of the next legislature. In March, 1866, the legislature enacted the "stay-law" over the executive veto, and again in December, 1866.

Some of these acts provided for a suspension of the statute of limitations, others for stay of levy of executions, and others for satisfaction of judgments at stated periods and in installments, but the general effect of all was a stay of the process of the courts against the debtor class until the people of the State could recover from the disaster of war. When Aycock *v.* Martin was argued, there was a consolidation of four cases in one, and the four brought in question not only the constitutionality of the ordinance of 1865 and the act of 1861, but the later acts of 1866, and in fact all the acts to which reference has just been made. In one of the four cases embraced in this Aycock case the presiding Chief Justice Warner had presided as circuit judge. Two of the cases had been argued at the previous term of the court and had been held under advisement. The third case, which was an action of trespass against the sheriff, was the only one of the four where the circuit judge had held in favor of the constitutionality of the law, he having sustained a demurrer to the action in trespass. Linton Stephens and B. H. Hill were among the very large array of eminent counsel engaged in this controversy. The judges delivered their opinions *seriatim*. Judges Warner and Harris concurred in holding the stay-laws unconstitutional, Judge Walker in a very able dissenting opinion holding to the contrary. It was held that the binding force and coercive power of the law applicable to the contract as the same existed at the time it was made constituted the obligation of the contract, and the legal right for its enforcement existed. Therefore any legislative act postponing or obstructing enforcement impaired the obligation and was on this account void.

The fight seemed to wage thickest around the argument of Chief Justice Marshall in the noted case of Stergis *v.* Crowinshield, where it was held that there was a distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, and that such distinction existed in the very nature of things. It was insisted by the majority of the Georgia court that that case called for no expression of judicial

opinion upon that point. Said Judge Harris: "These opinions are *obiter dicta*. They have been productive of infinite controversy. They have perplexed the legal mind of the country ever since. They have been the parents of a prolific brood of insidious and evasive efforts made by State legislatures under the promptings of unprincipled demagogues, who have the people ever on their tongues but never in their hearts, to destroy the machinery of government itself, by causing collisions among departments where there should be harmony, provoking, moreover, collisions and arousing jealousies between the States and general government, in the exercise of the powers granted by the people."

But Justice Walker, in his dissenting opinion, uses this same case of Crowinshield to sustain his argument that the remedy was entirely independent of the obligation, and read in the light of that day it did seem that he had the best of the argument though in the minority. Towards the close of this exhaustive and able opinion occur these words: "All I contend for is the right of the supreme power of the State—the lawmaking power—to withhold its arm from the creditor until the people, by industry and economy, may have a little time to recover from the devastations of a war unparalleled in modern times; and which swept over Georgia, from Dade to Chatham, leaving everywhere lonely chimneys as sentinels to tell of the ruin brought on the country. I insist that such legislation, under the circumstances existing in our State, is just such as Chief Justice Taney referred to when he said: 'It must reside in every State to enable it to save its citizens from unjust and harassing litigation; and, to protect them in those pursuits which are necessary to the existence and well-being of every community.' "

Want of time forbids that I go more largely into this celebrated case. To the older lawyers of Georgia it is familiar. To those who know of these times as only a part of the history of our State, I commend this case as one of the most interesting pieces of legal literature in the Georgia reports. It is a very

lengthy case, consuming nearly one hundred pages of the volume in which it is found, and its perusal will afford to the student of law and to the active lawyer much pleasure and profit.

It will be observed that these adjudications were prior to the convention of 1868. Upon the adoption of the Constitution of that year there followed many enactments which were operative as stay-laws, and which gave to the several courts much food for profound thought, to the citizens mending causes of contention, and to the members of the bar opportunity for constant legal warfare and the acquisition of comforting fees. To some of the most important of these enactments full reference has been made. It needs only to be added that the provisions of the Constitution of 1868 for a very liberal homestead and the judgment of the State Supreme Court, holding that the homestead act was retrospective as well as prospective, had the effect of operating as a stay-law almost as disastrous to the creditor class as any former enactments of this time; but when Gunn *v.* Barry came from the Supreme Court of the United States, in 1873, reversing this ruling, the disheartened creditor class took new hope.

The judgment in the Gunn case was sweeping in its extent. It settled more than the mere question of the effect of the homestead act. It estopped all possibility of claim that the State Constitution possessed any additional virtue by having had the sanction of the Congress. "Congress (said the court) cannot, by authorization or ratification, give the slightest effect to a State law or constitution, in conflict with the Constitution of the United States." This case also settled finally the point which had so engaged the attention of our State court in Aycock *v.* Martin, above referred to, and enunciated as law in unequivocal terms the proposition that the legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation, and any constitutional provision or legislative act which substantially changes such remedies is utterly void. Thus did the calm and dispassionate judgment of the highest judicial tribunal of the land, in the later

years, sustain the judgment of the able executive who had persistently vetoed, and the opinion of the conscientious judges who had as persistently declared against these unwholesome laws, despite the clamors of the people in the stormy days of civil strife and the black nights of reconstruction.

We will conclude our reference to stay-law litigation by a passing mention only of what was known as the act of 1869. This limited the right of action to January 1, 1870, in the cases as in said act enumerated, and thereby operated as a stay-law which shut out much litigation which would otherwise have arisen, and served to settle definitely many matters which would have vexed the courts for years. This act was very extensive in its application, but did not, however, prevent the suggestion of many complicated questions where doubt existed as to its applicability. This gave rise to some litigation, but the act upon the whole was salutary. It recited in its preamble that it was passed on account of the confusion that had grown out of the distracted condition of affairs during the late war. Its constitutionality was tested in George *v.* Gardner, and sustained by the United States Supreme Court in Terry *v.* Anderson.

Another source of litigation in the reconstruction period involving the most intricate questions was the status of the freedmen and the obligation of slave contracts. At the very outset there were grave complications as to what relation to the body politic stood the half million of emancipated slaves in Georgia, and it became necessary, under the new order of things, to define exactly what was meant by the words "persons of color" as they stood in the Code. These were declared by legislative enactment to be such persons as had one-eighth of African blood in their veins. The act so defining them gave these persons the power as freedmen to make contracts, sue and to be sued, testify in the courts, inherit, purchase and sell property, and to enjoy material rights and security of personal estate and such other rights as are embraced in the usual civil rights of citizens, but this enactment did not, with all this, confer the rights of citizen-

ship. The fact of emancipation was obliged to be accepted, and this new factor in the body politic, the freedman, necessarily had to be recognized. The withdrawal from the control of landowners of the splendidly equipped system of slave labor forced upon the landed proprietors employment of the freedmen as day laborers and as tenants. This led to contracts for labor and for supplies, and out of these grew numbers of lawsuits, and it was years before the respective rights of the parties to these new species of contracts became to be definitely settled and understood.

By far the two most important questions for adjudication upon this subject of the slaves and the slave contracts were: first, the nature of the obligation of contracts wherein the slave property was a consideration, and second, the status of the slave as a freedman.

We will refer briefly to the first question. As soon as the war ended parties began immediately to seek enforcement of their rights through the courts, and countless notes, the consideration for which was slave property, were placed in suit. One of the first cases of which we read was Hand *v.* Armstrong, where the defendant pleaded non-liability on breach of warranty because of emancipation. There was a warranty that the property sold were slaves for life. It was declared that there was no breach because the warrantor did not covenant against the act of the government.

The convention of 1868 incorporated in the celebrated Constitution of that year a section to the effect that no court or officer shall have, nor shall the General Assembly give, jurisdiction to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof. When this became the law there remained but one thing to be done by those holding these slave contracts, and that was to test its constitutionality. The question, like almost every other important question brought before the courts in those days, required an elaborate discussion of the bearing of the Federal Constitution

upon the relation of the people of Georgia to the Union both at the beginning, during and at the termination of the civil struggle, and during the period of reconstruction. Shorter sued Cobb in Randolph superior court, in November, 1868, on a simple promissory note the consideration of which was a slave. The case on appeal was decided by the Supreme Court of Georgia, at its June term, 1869, and by a divided court, the opinion being that the courts of Georgia had no jurisdiction of such a case. On this apparently simple case the right of secession, the status of Georgia in the Union, the authority of Congress in establishing a provisional government subsequent to the declaration of peace, the organization and admission of States into the Union, the guaranty by the general government to each State of a republican form of government, and all similar and kindred questions were elaborately discussed. Following this case immediately was White *v.* Hart, involving the same question, a case which found its way to the higher tribunal and invoked a discussion of the same questions, causing the Supreme Court to hold that the clause of the State Constitution above referred to was void, and to hold further that the reconstructed States of the South had never been out of the Union. The case of White *v.* Hart, of course, resulted in the overruling of all former decisions of the Georgia courts as to this form of contracts, and then the brethren of the bar had large employment in moving to set aside the many erroneous judgments which had been rendered in such cases; but actions arising upon such contracts have at last been long since barred, and we can confidently state that this class of litigation is distinctly of the reconstruction period only and will be found to have filled a very large share of the court records of those days.

Till the Constitution of 1868 the status of the slave as a citizen did not admit of a question among the people. The act of 1866 designated him as a person of color and defined his rights. There was a collateral question growing out of the solution of his status, which, in the domestic reconstruction of the

State, came near shaking the very foundation of society. This was his right to intermarriage with the whites. In the case of Scott *v.* The State of Georgia, the courts had to pass upon the legality of this marriage relation. The judges, to their honor be it said, though some of them had gone to great lengths along other lines to sustain partizan prejudices, nevertheless in this matter stood as one man and announced the practice of miscegenation as illegal, and the claim to social equality between the races as unwarranted and without law to support it. What would have been the future of Georgia had their decision been otherwise?

The question, however, paramount to all others, was the right of the slave as a freedman to vote and to hold office, a right which was not recognized by the citizens of the State even after the adoption of the Constitution of 1868, in which instrument he was recognized as a citizen and was given the right to vote. The President of the United States, in 1866, demanded of the seceding States a recognition of the fact that slavery was abolished and required a repudiation of the war debt, and these demands were promptly complied with upon the part of Georgia. The extreme partizans of the party in power were not satisfied, and there began a struggle with them and the President which resulted in a demand for the recognition of what were known as the fourteenth and fifteenth amendments to the Constitution. The former made the negro a citizen, and the latter, which, however, was not ratified by Georgia till 1870, enforced negro suffrage.

The legislature of 1868, though following the convention of 1868, refused to recognize the freedmen claiming seats in the former body as legally entitled thereto, and they were expelled. The legislature, however, accepted and ratified the Fourteenth Amendment, and Rufus B. Bullock was inaugurated as Governor July 22, 1868. This expulsion of members took place in December, 1868. Again in March, 1869, the legislature had under discussion the acceptance and ratification of the

Fifteenth Amendment entailing negro suffrage and this was rejected. It was then that a bill was introduced in Congress (December, 1869), making the acceptance of this amendment a condition of the admission of the State into the Union. The legislature of 1870 was organized under military order and the Governor of the State was aided in his efforts to administer the affairs of the executive office in his own way by the military authority of the general government. While the legislative and executive branches of the State government were thus contending over this question as to the status of the slave, the courts were likewise preparing to settle the same in a judicial way. The test case was made in Chatham county, where White, a negro, had been elected to the office of the clerk of the superior court of Chatham county, and Clements, a white citizen, who had received the next highest vote, filed a petition praying leave to file an information in the name of the State in the nature of a *quo warranto*, inquiring by what right White held the office. The case was tried before Judge William Schley, of the circuit bench, and White was represented by James Johnson, the ex-provisional Governor of the State, and Amos T. Akerman, afterward Attorney-General of the United States. The jury found White to be a negro, as it was known that he had one-eighth of African blood in his veins, and the court ordered that he desist from intermeddling with or exercising the duties of the office. The case was argued at great length in the Supreme Court, and its result was awaited with the deepest interest. At that time the intelligent white people of Georgia and those owning property felt that a reversal of the decision of the court below would result in absolute ruin to the State, because with the negro entitled to vote and to hold office, assisted by the white element then controlling him and backed by federal authority, there would be no possible chance to save the State from complete destruction. As usual on such questions there was a divided court, but the majority reversed the court below and settled the status of the negro as a freedman, holding that he was a citizen of the

State, entitled to all the rights of personal security, personal liberty, the right to hold and dispose of property, the elective franchise, the right to hold office and to appeal to the courts, to testify as a witness, perform any civil function, and to keep and bear arms. In this case the legality of the convention of 1868 was discussed at great length. The dissenting opinion of Judge Warner upon this question was based on the proposition that while the Constitution of 1868 declared the negro to be a citizen of Georgia, it did not specially confer upon him the right to hold office. Upon the contrary a proposition to confer that right upon him had been voted down by the convention of 1868, as shown by the journal of that body, clearly indicating that the legislative will of the convention was that he should not be allowed to hold office. He further contended that the adoption of the code of 1863 by the convention did not impliedly carry with it the right to the negro to hold office, because when the law of the Code was enacted such a class of citizens was not contemplated. This case was decided in June, 1869, but the apprehensions of the people as to the effect of the decision happily proved unfounded; the legislature of 1870 accepted the requirement of Congress in ratifying the fifteenth amendment, and negro suffrage and the right to hold office was a fixed fact. The federal power, contrary to expectation, stayed its hand of interference, the chief executive, the year following, resigned his office and fled the State, and a legislature was organized, having been elected by the white people of the State and by many of the better class of negro voters. On January 12, 1872, James M. Smith, who had been the Speaker of the new House of Representatives, was inaugurated as Governor. The machinery of the State in all departments now began to run smoothly; passion had spent its novel force, and soon the public sentiment crystallized in the assembling of the new State Convention and the adoption of the new Constitution. This was done, and from that date what we know as the Reconstruction Period is only a matter of history.

It will be observed that I have thus far treated only of leading questions provocative of litigation in the reconstruction period. Relief and stay-laws, Confederate contracts and the status of the slave were without doubt the most prolific sources of forensic contests, but these were not all. Proprieties of the occasion forbid detailed reference to the multitude of other causes of controversy.

There was a large class of cases growing out of the rightful ownership of property which had been sequestrated as belonging to alien enemies under the enactments of the Confederate government.

A novel case arose out of the right of a holder of a promissory note to recover where the consideration was for services rendered as a substitute in the army. The contract was held illegal and it became necessary for the court to solemnly adjudicate that Georgia could not secede from the Union. "By no act (say the court) could the State destroy the unity of the Government of which she constituted an integral part, except by successful revolution, which had not been accomplished." The majority of the court declined in this case to denominate the struggle between the States a civil war or a rebellion, but Judge Harris dissented and boldly declared secession a right, the contest a public and civil war, and the government a *de facto* government. (Chancely *v.* Bailey.)

As Reconstruction is as a book that is closed, one may be led to inquire the ultimate effect of the litigation of this period upon the State. It has been said that the surroundings and necessities of the people shape their legislation, and that it is the business of the courts and the lawyers to adapt the principles of law to these exigencies of life. Truly was this the case in the period of which we have written. The entirely novel surroundings of the people of Georgia from 1865 to 1872, and their peculiar necessities, gave rise to novel and unheard of legislation, and her peculiar relation to the government suggested new and great questions radically affecting grave and important constitutional principles.

Step by step the courts were called upon, with the aid of the bar, to adapt legal principles to these new conditions. In doing this, however, they not unfrequently were called to administer justice regardless of precedent. More than once was it announced that each case growing out of the prevailing conditions of those times had to be decided upon its own merit. This being true it will be observed that in the reconstruction litigation there seems to have been a gradual drifting from the enforcement of technicalities and a tendency towards the administration of justice on principles alone of equity and a sense of right. I am not so sure but that the methods of those days awakened a line of thought which in time gave to us of this day the courage to take the steps which have been taken in the breaking away from form and precedent. Can we not see in the "General Procedure Act," the abolition of formalities in pleadings (by a more liberal amendment of this act), the merging of many of our distinctive courts into one tribunal of justice, and in kindred measures, the same spirit which characterized the lawyers of those days in shaping legislation and litigation to existing conditions?

Reflection upon the subject in hand would not be complete without at least a general reference to the judges and lawyers who were moving, acting figures in this great drama of reconstruction.

In a scholarly paper presented to this Association in 1887 the circuit judge of reconstruction days was panegyrized in eloquent and truthful language by one of the most accomplished members of this body. In those days, when the liberties and property of the people were "tossed as a weaver's shuttle to suit the caprices of men in power, when the shifting will of a petty military despot caused law and right to quiver in the balance," the circuit judges stood like solid walls, and the judges of the higher courts, while wrapt in the very storm-cloud of passion and often overwhelmed by political influences which demanded other judgments, in most instances rendered decisions founded upon the principles of justice and right. In great civil questions

these arbiters of the law most frequently differed, and yet it was this difference which led to a clearer and more just sense of right, just as the contending forces of nature, in their battling, purify the atmosphere. Let us remember that when the regeneration of the State began there was an utter absence of law, a want of protection and security of person and property, without which there can be no advance in civilization; that there was no representation in the national legislature and the State Government was under military surveillance. The people were torn asunder by reason of bitter political differences and everywhere was the evidence of devastation.

True, there was a "sleep of the lightning, a lull of the wind, and a hush of the thunder of war," but the track of the storm had been left, and out of this chaos the work of rehabilitation had to begin. When we reflect that in less than a decade the great work of reconstruction was accomplished, and when in the history of its litigation, we are led to view with unprejudiced eye the noble part performed by the courts and the lawyers, we do not hesitate to accord to them the greatest praise. Truly has it been said by one of the best and bravest of the Georgia bar, now gone to his rest, and who was an active participant in these scenes, that the bench and the bar are the ministers to whom the State has entrusted the exposition and application of the principles of right and justice, and upon their learning, their integrity and diligence and their fidelity to trusts are secured the permanent and fruitful development of the institutions of the State, and to all the people are assured the equal protection of the laws.

The lawyers of the reconstruction period, not only for Georgia, but for all of the seceded States, gave a practical illustration of the recognized fact that with the members of the bar, whether on the bench or in the practice, is lodged that conservatism and that power of arriving at what is best for the general good, so necessary in the preservation of the State.

In the case of Hardeman *v.* Downer, involving the impor-

tant question of the constitutionality of the Homestead Laws of the Constitution of 1868, the court indirectly pays a splendid compliment to this phase of the lawyer's character where judicial reference is made to the fact that in the convention of 1868 the best lawyer in that body, though in thorough sympathy with the political party then in power, voted against the adoption of the instrument as a whole because he could not believe in the legality of the relief clause and because of the retroactive effect of the homestead provision—a position so effectually sustained by the courts long afterwards, as you will recall from the citations already made upon that subject. I trust that I will be pardoned for quoting in this connection an excerpt from the address of Hon. William L. Wilson, delivered in January last before the New York Bar Association. Said he: "The more we reflect upon all that occurs in the United States, the more shall we be persuaded that the lawyers, as a body, form the most powerful, if not the only counterpiece to the democratic element. In this country we perceive how eminently the legal profession is qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government. When the American people is intoxicated by passion, or carried away by the impetuosity of its ideas, it is checked and stopped by the most invisible influence of its legal counselors, who secretly oppose their aristocratic propensities to its democratic instincts, their superstitious attachment to what is antique to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience."

It has been well said that lawyers as a class form a party which is but little feared and scarcely perceived; which has no badge peculiar to itself, but which with great flexibility accommodates itself to the exigencies of the times, to all the movements of the social body; and that this party extends over the whole community and penetrates into all classes of society, acting upon the country imperceptibly, but finally fashioning it

to suit its purposes. Applying this sentiment to Georgia, we cannot be charged with partiality, if, after the lapse of more than a quarter of a century from the closing days of Reconstruction, we claim for the Bench and for the Bar of Georgia most of the credit for the safe conduct of the State through the perils of those days and the final restoration of the commonwealth to her own sons, a restoration which has brought to the State continually enlarging prosperity and given to the people that happy condition for which the noble Jenkins had so devoutly wished.

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